The sentence is therefore against the weight of evidence.

(b) That your petitioner has one wife and 3 children aged 5, 6, and 8 years old respectively to support and maintain. The imprisonment sentence would cause greatest hardship and difficulty to the family of your petitioner.

3. Your petitioner prays that the imprisonment sentence may be reduced to a small fine."

In addressing the court during the hearing of the appeal the appellant said he was appealing only against the sentences, not the convictions. In any event, the convictions clearly must stand. The government's order was to surrender all firearms and ammunition; the appellant's failure to surrender his shotgun and cartridges was his offence, a crime regardless of his state of mind at the time. The question of whether there was guilty knowledge or intention does not arise, is irrelevant in considering whether or not the offences charged had been committed.

It is very clear from the appellant's own evidence in the court below that he did at the relevant times know of the surrender order, which he calls a notice. It is also clear that he lives most of the time in Durin, Sibu District, and not in Kanowit, though he owns land in both places. The gun and ammunition were found in his possession in Durin five months after the surrender order was made. The court is satisfied that the appellant must have known (as the learned trial magistrate found) very well what the surrender order meant — that all nonnatives in the Sibu area and the other areas named must at once hand in their gun and ammunition. The appellant's concealment of the shotgun in his wife's bed supports this finding. He did tell the police of the shotgun, but that was after the seven cartridges had been found in his trousers. The court holds that the appellant knew that his possession of the shotgun and ammunition, and failure to surrender them, was wrong, a crime which he chose to commit for his own reasons.

There is no evidence to show that his reasons were particularly bad or treasonable ones; the appellant may indeed have kept the shotgun just to use on his farm in Kanowit though even about that there must be some doubt.

In any event he chose to flout the clear order of the government, an order made for security reasons, for the public safety, and made on dangerous times. The appellant will have to bear the consequences of what he was so foolish and reckless (if that is all he was) as to do.

I take into account what the learned deputy public prosecutor fairly said about this being a case in which there might have more properly been only one charge, taking in both the gun and the ammunition. I agree that one charge would be preferable, but I do not consider two necessarily wrong. In any case it was ordered that the sentence imposed should run concurrently. I have sympathy for the appellant's wife and children, but, (as the court often has to say in criminal cases) it is before, not after, the criminal act has been committed that wife and children should be thought of.

This court will only reduce or set aside a sentence if it considers it inappropriate, not fitting to circumstances of the crime, or if it considers it manifestly excessive. The maximum penalty for this crime is three years imprisonment, it was an offence against regulations for the preservation of public security committed at a time of semi-emergency; an offence the subject of which was a shotgun and ammunition; the surrender order was made because of the government's urgent desire to bring under its control all the shotguns and ammunition to which it referred. The court cannot say that in the circumstances a total sentence of six months is inappropriate, or manifestly excessive; nor is there anything wrong in principle on this sentence.

This appeal is dismissed. The appellant is now to serve the sentence imposed, a total of six months to run from to-day.

Appeal dismissed.

GORE v. GORE

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Wylie C.J. (Borneo)) January 6, 1964]

[K.L. — Federal Court Civil Appeal No. 20 of 1963]

Contract — Husband and wife mutually consenting to live apart — Agreement to pay maintenance to wife and children — Mutual consent ceasing to exist — Children self-supporting — Whether agreement frustrated.

Practice & Procedure — Scope of O. 32 r. 6 — Not applicable when there is serious question of law.

On September 14, 1959, the plaintiff and defendant, who were husband and wife, entered into a written agreement, when they were about to live apart by mutual consent, by which the husband agreed to pay monthly sums by way of maintenance to the wife and their three children, none of whom were able to contribute to their own support. The agreement was executed in Singapore.

On March 4, 1963 the wife commenced proceedings to recover $3,000 being arrears of maintenance. The husband filed a defence in which he contended that the agreement was no longer enforceable on the grounds: (a) it was entered into to provide for the maintenance of the wife and children while the parties were living apart by mutual consent and that the husband afterwards ceased to consent to his wife living apart from him and (b) the agreement was to provide for the maintenance of the wife and children but one or more of the children were now gainfully employed and no longer in need of maintenance.

The wife then took out a summons for judgment under O. 32 r. 6. The learned judge gave judgment in favour of the wife ([1963] M.L.J. 343). On appeal,

Held: (1) the case was not a suitable one to be dealt with under O. 32 r. 6 as it involved a serious question of law;

(2) as the husband had not introduced express words limiting his liability the court could not insert such words by implication as to do so would be to encourage the view that a husband could get rid of the consequences of such an agreement by giving the wife grounds for divorce. The husband was therefore liable under the agreement.

Charlesworth v. *Holt.*(3) followed.

Observations by Thomson L.P. on *stare decisis*, p. 188.

Cases referred to:—

(1) *Gilbert* v. *Smith* 2 Ch. D. 686, 689.

(2) *United Telephone Co.* v. *Donchee* 31 Ch. D. 399.

(3) *Charlesworth* v. *Holt* L.R. 9 Ex. 38.

(4) *Grant* v. *Budd* (1874) 30 L.T. 319, 320.

(5) *Negus* v. *Forester* (1882) 46 L.T. 675, 676.

(6) *Fearon* v. *The Earl of Aylesford* (1884) 12 Q.B.D. 539, 548.

(7) *Nicol* v. *Nicol* (1886) 31 Ch. 524.

(8) *In re Gulling* (1905) 74 L.J. Ch. 335.

(9) *Hyman* v. *Hyman* [1929] P. 1, C.A.; [1929] A.C. 601, H.L.

(10) *May* v. *May* [1929] 2 K.B. 386.

(11) *Kirk* v. *Fustace* [1937] 1 K.B. 278.

(12) *Adams* v. *Adams* [1941] 1 K.B. 536.

FEDERAL COURT.

S. D. K. Peddie for the appellant.

A. L. Hills for the respondent.

Cur. Adv. Vult.

Thomson L.P.: This appeal arises from proceedings which have taken a somewhat unusual course.

The parties are a husband and a wife, the wife being now in England, or rather Wales, and the husband in Kuala Lumpur.

On 4th March, 1963, the wife issued a specially indorsed writ against the husband. The statement of claim was to the effect that she and the husband had entered into a written agreement on 14th September, 1959, whereby the husband agreed to pay to her a sum of $600 a month for the maintenance of herself and the three children of the marriage and that an amount of $3,000 was owing under that agreement which sum was claimed. It is admitted that this agreement was executed in Singapore, where the law of contract is the law of England.

Nothing was done by way of getting leave to defend but the husband entered appearance and filed a defence without, apparently, any objection being taken by the wife.

By the defence the husband admitted the making of the agreement and did not deny that if anything was owing under it the amount was $3,000. He said, however, that it was "no longer enforceable" on two grounds. In the first place it was entered into to provide for the maintenance of the wife and children while the parties were living apart by mutual consent and the husband afterwards ceased to consent to his wife living apart from him. In the second place (and apparently in the alternative) the agreement was intended to provide for the maintenance of the wife and the children but one or more of the children had since become gainfully employed and were no longer in need of maintenance from their father. In the circumstances the sum of $600 a month was no longer payable, although the agreement itself contained no provision as to what sums were to be payable upon the children or any of them becoming able to maintain themselves.

In other words the husband set up a defence of frustration of the contract. And to make out that defence he did not rely on any express provision of the written agreement but on the surrounding circumstances.

On that state of the pleadings the wife took out a summons for judgment under Order 32 rule 6 which reads as follows:—

"Any party may at any stage of a cause or matter, where admissions of fact have been made either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think, just."

The summons came on for hearing before Gill J. who in the event gave judgment for the wife as prayed. His reasons are contained in the following passage from his judgment:—

"It is quite clear that the payment of $600 a month was made under a written agreement which was entered into by the parties by mutual consent. The agreement not having been varied or cancelled by agreement between the parties, it is still a valid contract and therefore enforceable by the court. So long as the contract is in existence the duty of the court is to interpret it and not to vary it unless the question of its rectification or cancellation is raised by way of counterclaim or by a separate action."

The husband has now appealed.

Now, with great respect, I do not think the case was a very suitable one to be disposed of under Order 32 rule 6. There was, of course, a discretion to deal with it in that way but, as was pointed out by Mellish L.J. in the case of *Gilbert* v. *Smith,*(1) in relation to the corresponding English rule prior to 1883, 'the rule was not meant to apply when there is any serious question of law to be argued" and here it now transpires that there was a serious question of law to be argued, although I hasten to add that that question of law was not very strenuously argued in the court below. And I would further add that there can be no question of the proceedings being a nullity if the case falls, as I think it does, within the wording of the rule.

I now proceed to deal with the appeal on what seem to be its merits *tanta et talia.*

In effect rule 6 of Order 32 only applies when on the pleadings a defendant has no good defence and for the purpose of considering the application of the rule the court must accept the contents of the defence as true (see *United Telephone Co.* v. *Donchee* [2]).

On that basis what are the facts?

They are as follows. The husband and wife were living apart, or were about to live apart, by mutual consent and entered into a written agreement, which is not before us, by which the husband agreed to pay monthly sums by way of maintenance of the wife and her three children, none of whom were able to contribute to their own support. The mutual consent of the parties to live apart has now ceased to exist and one or more of the children are now able to contribute to their own support but the agreement contains no express provision relating to either of these eventualities.

These facts are, of course, hypothetical in the sense that they are only alleged and have not been proved. The question, however, is whether if proved they could make out that by reason of frustration the agreement between the parties is unenforceable. As Mr. Peddie for the husband has very candidly admitted, that question turns on the view this court takes of the English case of *Charlesworth* v. *Holt* [3] which was decided in 1873, the year before the Treaty of Pangkor. If this court takes the view that that case is to be followed then the appeal must fail.

In *Charlesworth* v. *Holt, supra,* a husband and wife entered into a separation deed to which trustees for the wife were parties (it is to be remembered that this was prior to 1892). Under that deed the husband covenanted to pay an annual sum to the wife "during the joint lives of himself and his said wife, and so long as they shall live separate and apart" but there were no words limiting the obligation to the period during which the marriage tie subsisted. Later the marriage was dissolved by divorce for the wife's adultery. Thereafter the wife sued for her annual payments under the deed. It was common ground that from the beginning the parties had contemplated that the marriage would continue to exist. For the wife it was argued that no words had been used in the deed to limit the husband's liability to the period of the marriage and that in the absence of such words the obligation to pay was absolute and endured for the joint lives. For the husband it was argued that the question was one of construction and the covenant should be read as limited to the period during which the parties were man and wife and were living apart.

On a demurrer the court decided the question in favour of the wife. Kelly C.B. said (at p. 40) :—

> "The husband might, in this case, have introduced express words limiting his liability to the period during which Lucy Holt remained his wife. But there are no such words, and Mr. Holker has not satisfied me that any words are used which necessarily imply that the covenant is only to be binding during the continuance of the marriage tie. It is impossible for the court to add such a term to the contract. If the contract were to be so considered, it would be possible for the husband, by giving grounds to his wife for a petition for divorce against him, to put an end to his liability.
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> . . . . . .
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> We certainly ought not, unless constrained by express words or clear implication, so to interpret the contract."

Bramwell B. said (at p. 41) :—

> "There are, no doubt, expressions in the deed which seem to contemplate the continuance of the marriage.
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> . . . . . .
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> Surely it would be a strange result that, as my lord pointed out, the husband could release himself from liability by such misconduct as would justify his wife in applying for a divorce."

Pigott B. said (at p. 42) :—

> "I am of the same opinion. We cannot imply the term contended for (by the husband)."

On this it is probably fair to say that while the court was no doubt influenced by the reluctance of the law of England at the time (1873) to read implied terms into written contracts in any circumstances it was also influenced by the consideration that to do so in a case as that before them would be in effect to permit a husband to get rid of his obligation by his own misconduct. That is all the clearer when it is remembered that in fact it was the wife and not the husband who had been guilty of misconduct.

In the present case it has been argued that in England the case of *Charlesworth* v. *Holt, supra,* has given rise to doubts which by reason of the enactment of the Maintenance Agreements Act, 1957, are unlikely now to be resolved by the House of Lords. In the circumstances it has been urged that in this country, where there is no legislation corresponding to the English Act of 1957, this court should give serious consideration to the question of how far we should follow the case which, of course, is not binding on us in the technical sense.

It will thus be desirable to observe just what has been said in England regarding *Charlesworth* v. *Holt.*

The case was decided in 1873 and the first criticism of it was heard the following year in the case of *Grant* v. *Budd* [4] where Cockburn C.J. in the Queen's Bench said it was binding on that court but: "If this were *res integra,* I should hesitate a long time before I came to the same conclusion."

After 1874, although the case was mentioned in the cases of *Negus* v. *Forester,* [5] *Fearon* v.

The Earl of Aylesford,[6] *Nicol* v. *Nicol* [7] and *In re Gilling,*[8] it did not attract comment for over 50 years when it was discussed in the case of *Hyman* v. *Hyman.*[9]

What was involved in that case was not a covenant by a husband to pay maintenance but a covenant by a wife not to take proceedings against the husband for maintenance beyond a stipulated amount. The marriage had been dissolved for the husband's adultery and the question was whether, notwithstanding the covenant, the wife was free to take proceedings for permanent maintenance under section 190 of the Judicature Act of 1925.

It was the husband's case, based largely on *Charlesworth* v. *Holt,* that the covenant was binding on the wife and that, in the absence of express words, there was no justification for reading into it anything limiting it to the duration of the matrimonial tie. That argument failed but there was no question of *Charlesworth* v. *Holt* being over-ruled.

In the Court of Appeal three of the four judges who decided the question in favour of the wife (Lord Hansworth M.R., Scrutton and Sankey L.JJ.) expressed doubts as to whether *Charlesworth* v. *Holt* would have been decided in the same way in 1928 but the ground on which they based their decision that the covenant was not binding on the wife was that so to hold would be to oust the statutory jurisdiction of the divorce court. The other majority judge (Greer L.J.) and the two judges who dissented (Lawrence and Russell L.JJ.) mentioned the earlier case but expressed no doubts regarding it. The House of Lords agreed with the decision of the majority of the Court of Appeal but the only one of their lordships who mentioned *Charlesworth* v. *Holt* was Lord Atkin, who said this (at p. 627) :—

"I cannot myself think that the event of divorce is something so unforeseen, or the continuance of the marriage tie so essentially a condition of the contract that the dissolution of the marriage can properly be treated as automatically dissolving the provisions for paying the allowance. I find myself the less able to believe that the law should now impute this implied condition to the parties, or impose it on the contract, whichever be the correct formula, when I find that fifty-four years ago, in *Charlesworth* v. *Holt,* the Court of Exchequer held the contrary; and that separation deeds must have been drawn on this footing ever since."

I now pass to the case of *May* v. *May* [10] where Scrutton L.J. elaborated the doubts he expressed in *Hyman* v. *Hyman.* In that case there was a separation deed containing a covenant whereby the husband undertook to pay maintenance during the lifetime of the wife. The marriage was subsequently dissolved for the husband's adultery and the wife thereafter sued for arrears of maintenance under the separation deed. It was held by the Court of Appeal (upholding the decision of Horridge J.) that *Charlesworth* v. *Holt* should be followed and that the deed was not subject to any implied term that it should operate only so long as the marriage relation continued to exist between the parties.

Scrutton L.J. said (at p. 392) :—

"I have come to the conclusion that, whatever view this court might have expressed if the question in *Charlesworth* v. *Holt* arose for the first time now, when the doctrine of frustration has reached its present stage of development, the court will not interfere with a decision which has stood so long and has been the foundation of so many deeds of separation between so many married couples. If the case had never arisen until now, there would have been a good deal of ground for saying that the deed made for the purpose of defining rights and obligations of two parties to a marriage was subject to the condition that the marriage should continue."

He went on to discuss a number of the "frustration cases" and concluded (at p. 394) :—

"If the question in the present case had no previous history but had arisen for the first time after the decision of those cases, there would be much encouragement for the view that this husband and wife in providing the terms on which they should separate were providing for the time during which they should continue to be husband and wife, although separated, and on the footing that if they should cease to be husband and wife the operation of the deed should cease also. But the question is not whether they might, but whether they must have made their bargain on this footing. Can it be said that all husbands and wives who have executed deeds of separation must have made their bargains on the footing that the relation of husband and wife should in each case continue? Separation agreements have been drafted which provide that they shall continue valid although that relation should cease to exist. It is also the common practice for the court in matrimonial cases to treat separation deeds as still existing when making a decree of maintenance or varying a settlement. Considering the number of years during which *Charlesworth* v. *Holt* has stood for law, the number of separation deeds in existence, and the number of persons who are living under the provisions contained in them, I do not feel able to give effect to the doubt which I expressed in *Hyman* v. *Hyman* and which I still entertain."

Greer L.J. said (at p. 395) :—

"It is urged that we ought not to consider ourselves bound by *Charlesworth* v. *Holt,* because that case does not expressly deal with the doctrine of frustration; but though the doctrine is not mentioned in so many words, the reasoning of the Court of Exchequer excludes its application."

and he then proceeded to refer to the passages from the judgments of the judges who decided the case which have already been quoted here.

Russell L.J. said (at p. 397) :—

"Even if I thought the older decisions were of doubtful authority I should still be of opinion that we ought not to overrule them and interfere with the rights and liabilities of the parties to unnumbered separation deeds; but I do not wish to be taken as questioning the soundness and correctness of the old decisions."

The only other cases which call for mention are *Kirk* v. *Fustace* [11] and *Adams* v. *Adams.*[12]

Kirk v. *Fustace* was a separation deed case where the husband had died and the wife sought to enforce payment of maintenance for the period after his death. It was held that she could not do so. Slesser L.J. referred to *Charlesworth* v. *Holt* (at p. 283) as "the leading case on this matter" and said that it had been followed in *May* v. *May*. He went on, however, to distinguish the case before him on the ground that the two earlier cases proceeded "on the footing that both parties survive". In the present case "the whole substratum of the contract that the spouses are living apart (whether as husband and wife or otherwise) has gone", and Scott L.J. expressed agreement with him.

Adams v. *Adams* was another separation deed case where the husband had obtained a decree of nullity on the ground of the wife's incapacity and the wife sued for maintenance in respect of a period after the decree. The Court of Appeal held she was entitled to do so. With regard to the frustration argument Clauson L.J. said "it seems to me that the last word on this subject was said by Lord Atkin in *Hyman* v. *Hyman*", and in the course of his judgment he said (at p.546) :—

> "An argument which in principle appears to me to be indistinguishable from that put forward by the appellant was raised in the Court of Exchequer in 1873 in the case of *Charlesworth* v. *Holt*, on the construction of a similar document, and was rejected, after argument by very distinguished counsel, by a strong bench of that court.
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> . . . . . .
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> If we accepted it, we should in effect be overruling a case which has stood in the books as an authority for many years, and was accepted as correct by this court in *May* v. *May*. In my opinion *Charlesworth* v. *Holt* was decided on a correct principle and its principle is binding upon us and completely justifies the decision of the county court judge."

Scott L.J. had already referred with approval to *Charlesworth* v. *Holt* (at p. 543) and Goddard L.J. after referring to *Charlesworth* v. *Holt* and *May* v. *May* expressly followed these cases.

As has been said it is now unlikely that *Charlesworth* v. *Holt* will again be considered by the courts in England but in all that has been said it is difficult to see anything to support the view that it would not be followed there.

Nor do I see any reason why it should not be followed here in the case of an agreement that has been entered into in a State where the law of contract is the law of England, though I would refrain from expressing any opinion as to what the position might be in the case of an agreement made in a State where the law of contract is based on the Indian Contract Act.

The reasoning of Kelly C.B. is as persuasive to-day as it was in 1873. The husband might have introduced express words limiting his liability but he did not do so and for the court to insert such words by some sort of process of implication would be to encourage the view that a husband could get rid of the consequences of such an agreement by giving the wife grounds for divorce.

Again, to my mind the principle of *stare decisis* has just as much force in Singapore as in England in relation to this sort of case. It may well be that there are fewer separation agreements made in Singapore than in England by reason of the matrimonial *mores* of large numbers of the inhabitants of that Arcadian island, but a substantial number of these inhabitants have the same matrimonial *mores* as the inhabitants of England and if and when they do enter into separation agreements they are entitled to expect that these agreements will be interpreted by the courts as they have been interpreted in England for the last 90 years.

Nor, I would add, am I impressed by the argument that there is some sort of hardship on the husband because there is no local legislation corresponding to the English Maintenance Agreement Act, 1957. I can see nothing in that Act to prevent him going to England and seeking relief under it from the English courts and we are entitled to assume that unless his presence in this country is unlawful (in which case he will be removed without any cost to himself) he cannot be in a state of actual poverty.

For these reasons I would dismiss the appeal with costs.

Wylie C.J. (Borneo): The respondent (plaintiff in the court below) proceeded by way of specially indorsed writ and her statement of claim so indorsed was a claim for $3,000 due under a written agreement whereby appellant (defendant) agreed to pay $600 a month by way of maintenance for the respondent (his wife) and their three children.

In paragraph 1 of the written statement filed by the defendant, this agreement is admitted and there is no denial that the sum of $3,000 remains unpaid thereunder. Paragraphs 2 and 3 of the written statement proceed as follows:—

> "2. The defendant contends and will contend that the said agreement was entered into to provide for the maintenance of the plaintiff and the three children of the parties while the plaintiff and the said children were by mutual consent of the plaintiff and the defendant living apart from the defendant. The defendant has requested the plaintiff and the children to take up residence with him and is ready and willing to have them resume residence with him. He no longer consents to their living apart from the defendant and contends that in the circumstances the agreement is no longer enforceable.
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> 3. In the alternative the defendant contends that the sum of $600 per month provided for in the agreement was intended for the maintenance of the plaintiff and

the three children. The defendant contends that one or more of the children are now gainfully employed and are no longer in need of maintenance from the defendant and contends that in the circumstances the sum of $600 per month is no longer payable. Since the agreement contains no provision as to what sums are to be paid upon the children or any of them being able to maintain themselves the defendant maintains that the agreement is no longer enforceable."

In his grounds of judgment, the learned judge took the view that the admission in paragraph 1 of the written statement was an admission of the claim itself and apparently that paragraphs 2 and 3 amounted to an attempt to vary the terms of the agreement. As the question of rectification or cancellation had not, in his view, been properly raised, he considered that he had no option but to deal with the agreement as it stood. The agreement was not before the court. The judge appears to have considered that the admission in paragraph 1 of the statement was an admission that the agreement was in the form alleged by the plaintiff and that the matters covered in paragraphs 2 and 3 were not raised by the actual terms of the agreement in any manner. On these grounds, he considered that the agreement must be applied in accordance with what were apparently its express terms and that, these having been admitted to impose the obligation the respondent alleged, he should give judgment for the respondent under Order 32 rule 6.

Before this court, the argument for the appellant was that, the agreement not being before the court, the statement filed by defendant raised definite issues to be considered and that therefore the case was not a proper one to be disposed of under this rule. He appeared to submit that the questions raised were questions of frustration and discharge of the agreement. He conceded that the English authorities were against the appellant, these authorities being *Charlesworth and another* v. *Holt*,[3] *Hyman* v. *Hyman*,[9] *May* v. *May* [10] and *Adams* v. *Adams*.[12] All of these authorities are fully reviewed in the judgment of the Lord President which I have had the advantage of reading.

Finally, he conceded, in answer to the court, that, if the principle established in *Charlesworth* v. *Holt* is applicable in this case, the appeal must fail. I take this to mean that the agreement to pay maintenance which neither this court nor the court below has seen, is in a form that leaves no room to distinguish this case from the authorities referred to and does not include language which would specifically raise the question that the amount payable by way of maintenance would cease to be payable, or be abated, in the circumstances set out in paragraphs 2 and 3 of the written statement of the defendant.

But for this concession by counsel, which I consider was very properly made having regard to all the circumstances, I should have felt great difficulty in coming to the conclusion that this claim could be disposed of under Order 32 rule 6. The written statement of defendant must be read as a whole. Paragraph 1 must be read with paragraphs 2 and 3. Taken thus, I consider the statement to be an admission by defendant that he did enter into the obligation to pay maintenance as alleged, along with allegations that he has taken steps towards the parties living together again and that one or more of the children are now gainfully employed and no longer in need of maintenance from the appellant. By proceeding under this rule, the respondent accepts these allegations of fact. The written statement then proceeds to raise a question of law — that, because of these allegations of fact, the agreement is no longer enforceable. If the defence raises a serious question of law, it is not appropriate to proceed under this rule. I find it difficult to say that, in the absence of the concession made before this court by counsel for appellant for the purpose of reaching finality, it is possible to decide that no serious question of law has been raised in this case without considering the actual terms of the contract. In *Charlesworth* v. *Holt* and in *Adam's* case, for instance, the parties entered into a contract providing that, subject to other provisions, the payment should be made during the joint lives of the husband and the wife, while in *Hyman's* case and in *May's* case, the payment was contracted to be made during the life of the wife. In all these cases, the court had the terms of the contract before it in order to determine the precise intention of the parties. This seems to me to be the only manner in which the doctrine of frustration can be properly considered in cases like the present one, where performance has not in fact been rendered impossible. These provisions in the contracts must have had careful consideration by the various members of the different courts in coming to their decisions. In fairness to the judge of the court below, however, it must be stated that the statement of the defendant does not make any reference to the language of the agreement in support of his claim. Moreover, the concession made by counsel for plaintiff in this court satisfies me that no injustice has arisen from proceeding under this rule.

Consequently, this court is now free to consider this appeal on the basis that the agreement to pay maintenance is in language that does not directly raise the question whether there should be abatement in the circumstances alleged by the defendant. The question is thus a general one — as to whether the circumstances alleged should lead to abatement in maintenance payable under an obligation to pay expressed in usual terms. So stated, the issue raised is that of frustration. This issue has been effectively disposed of against

the appellant's claim by the authorities referred to above, first in *Charlesworth* v. *Holt* ninety years ago. Although some doubts were expressed in *Hyman* v. *Hyman* [9] concerning the earlier decision, it was expressly affirmed in *May* v. *May*. In both *Charlesworth's* case and in *May's* case, an absolute promise to pay maintenance was held to continue after dissolution of the marriage and in *Adams* v. *Adams* even after a decree of nullity. As counsel for respondent submitted, still less can there be any basis for the application of the doctrine of frustration when all that has happened is that the husband requested the wife "to take up residence with him" and that "one or more of the children are now gainfully employed and are no longer in need of maintenance" from the husband.

It appeared to be common ground between counsel during the hearing of the appeal that the principles of English law of contract would apply to this contract, which counsel stated was made in Singapore. I can see no reason why the principle applied in the English authorities should not apply to the circumstances disclosed in this appeal. Counsel for appellant conceded that, if this principle does apply, he cannot support this appeal. I agree and would therefore dismiss this appeal with costs to the respondent.

Barakbah C.J. (Malaya) concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.*; *Donaldson & Burkinshaw.*

PASUMA PHARMACAL CORPN. v. McALISTER & CO. LTD.

[O.C.J. (Ambrose J.) January 11, 1964]

[Singapore — Suit No. 1353 of 1960]

Contract — Manufacturers and importers — Distribution of chicken essence — Manufacturers giving exclusive right to importers — Whether relationship created is that of principal and agent or vendor and purchaser.

Contract — Vendor and purchaser agreement in respect of chicken essence — Agreement for 5 years — Termination by vendor without provision for termination — Fraud of servant of purchaser — Whether termination lawful before the expiration of the contract.

Damages — Breach of agreement by one party — Duty upon other party to take all reasonable steps to mitigate loss occasioned by the breach.

Agency — Exclusive right to distribute not agency contract.

Detinue — Not maintainable where there is no prior demand for return.

Conversion — Not maintainable unless plaintiff had the right of possession and a right of property in the goods at the time of the alleged conversion.

Under an agreement dated November 12 and 19, 1957 the defendants became exclusive distributors for a period of 5 years of the plaintiffs' chicken essence manufactured in New York. The chicken essence was sold in Singapore and Malaya under the "Apollo" trade mark of which the defendants were registered proprietors.

In May 1958 the defendants discovered that certain stocks of the chicken essence which they had received from the plaintiffs were cloudy and contained sediment. Following correspondence between the parties regarding this cloudiness and sediment, it was agreed by them in a cable sent by the defendants on January 5, 1959 and accepted by the plaintiffs on January 7, 1959 that the plaintiffs would replace the cloudy jars without cost to the defendants. The replacement was, however, to be carried out gradually over a period of time and this gradual extinguishment of the liability to replace substandard chicken essence was described by the parties as "amortization".

Under this amortization scheme the plaintiffs replaced a total of 1935 cartons of 3½ oz. jars and the defendants returned to the plaintiffs only 1288 57/72 cartons of the old stock which became the property of the plaintiffs under the scheme. The plaintiffs brought this action claiming:—

(1) damages for conversion of 646 15/72 cartons or their market value, alternatively,

a claim in detinue for 646 15/72 cartons of fresh chicken essence stock supplied in place of the quantity not returned by the defendants;

(2) damages for breach of the amortization agreement.

The defendants counterclaimed:—

(1) the full value of 634 127/144 cartons of 1¾ oz. jars containing sub-standard chicken essence which would have been amortized if the plaintiffs had not, by a letter dated June 3, 1960, repudiated the amortization;

(2) the sum of $44,495.55 due on a guarantee by the plaintiffs of the account of Chang Hway Trading Co. Ltd.;

(3) damages for termination of the contract of November 19, 1957 in breach of clause 8 of the contract which stated that the contract would continue for 5 years.

Held: (1) the plaintiffs' alternative claim in detinue was untenable because the prerequisite of a claim in detinue is a demand for return and no such demand was made; *Clayton* v. *Le Roy* [1] followed;

(2) of the 646 15/72 cartons claimed by the plaintiffs in conversion, 500 cartons had never really existed; the figure had been fraudulently added by a servant of the defendants to inflate the quantity to be amortized and therefore the 500 cartons received by the defendants as replacement were obtained by fraud; the defendants were liable for the fraud of their servant and must therefore pay to the plaintiffs the full price of these 500 cartons;

(3) as to the balance of 146 15/72 cartons there was evidence that 17 40/72 cartons were destroyed by the defendants at Kuala Lumpur; in respect of the remaining 128 47/72 cartons the court could not find conversion as there was no evidence that they had become the property of the plaintiffs before they were disposed of; in order to maintain an action of trover a person must have the right of possession and a right of property in the goods at the time of the alleged conversion; *Jarvis* v. *Williams* [2] followed;

(4) although the plaintiffs had failed to prove conversion in respect of the 128 47/72 cartons, the defendants were liable to account for them; their value would be the price which the plaintiffs could have reasonably expected to obtain from an importer willing to purchase them on the date on which the plaintiffs demanded their return;